

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH G. HUNN

Claimant

VS.

MONTGOMERY WARD

Self-Insured Respondent

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Docket No. **205,440**

ORDER

Claimant requested review of the August 26, 2009 Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on December 2, 2009.

APPEARANCES

David W. Whipple of Independence, Missouri, appeared for the claimant. Thomas Clinkenbeard of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.¹

ISSUES

This is a claim for a February 13, 1995, accident and alleged injury to the low back. ALJ Hursh found claimant's injury compensable under the Workers Compensation Act (Act) but denied claimant's request for permanent total disability benefits under K.S.A. 44-510c as claimant was not permanently and totally disabled as a result of the 1995 injury.

The ALJ also ruled that claimant was not entitled to receive any permanent partial general disability benefits. The ALJ first reasoned claimant was terminated for cause and, therefore, claimant failed to exercise good faith. Consequently, the ALJ imputed a post-

¹ The Board notes the parties entered into the record without limitation many medical records and letters from physicians who did not testify. Accordingly, the restrictions against medical records set forth in K.S.A. 44-519 do not apply.

injury wage in the amount of claimant's pre-injury earnings and held that under K.S.A. 44-510e (Furse) claimant's permanent disability benefits were limited to his functional impairment rating. But the ALJ then determined claimant failed to prove the extent of his functional impairment under the appropriate version of the *AMA Guides to the Evaluation of Permanent Impairment* and, therefore, claimant was not entitled to receive any permanent disability benefits.

The ALJ also held that respondent was responsible for medical mileage and medical bills totaling \$1,861, which were related to treatment provided by Dr. Glenn Amundson and the University of Kansas Medical Center during 1995, as authorized medical expense. But the ALJ specifically denied payment of claimant's medical expense incurred during 2006 as claimant failed to prove those bills were related to his 1995 injury and "[g]iven the naturally progressive and episodic nature of the claimant's back problems, it is highly unlikely that treatment provided in 2006 related to the aggravation of symptoms that occurred 11 years past."² Moreover, the ALJ determined respondent was not responsible for any future medical benefits.

Claimant contends he is essentially and realistically unemployable and, therefore, the Award should be modified to grant him permanent total disability benefits. In the alternative, claimant requests permanent partial disability benefits, which claimant maintains should be computed using actual post-injury wages rather than an imputed amount. Furthermore, claimant maintains the Award should be modified to require respondent to pay all of the medical expenses that he has incurred for his back, including those expenses from his 2006 back surgery and related treatment. Finally, claimant requests future medical benefits.

Conversely, respondent maintains that claimant neither injured nor aggravated his back at work in February 1995 and argues that claimant's present condition and recent surgeries are the result of a natural, progressive, degenerative condition. In the alternative, respondent maintains that a post-injury wage should be imputed for purposes of the permanent disability formula due to the fact claimant was terminated for misconduct. Respondent argues the *Bergstrom*³ decision, which held that 'good faith' is not an element of the work disability⁴ formula in K.S.A. 44-510e, is not applicable. Respondent asserts the Act disallows compensation for deliberate, self-inflicted injury and, therefore, it is contrary to legislative intent and public policy to reward misconduct with a work disability. Accordingly, respondent requests the Board to find that claimant failed to prove he

² ALJ Award (Aug. 26, 2009) at 6.

³ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

⁴ A permanent partial general disability under the formula of K.S.A. 44-510e that is larger than the functional impairment rating.

sustained an accidental injury while working for respondent and, in the alternative, find that claimant's misconduct bars him from receiving a work disability.

The issues before the Board on this appeal are:

1. Did claimant injure his back in an accident that arose out of and in the course of his employment with respondent?
2. If so, what is the nature and extent of that injury and any resulting disability?
3. Is respondent obligated to pay the medical bills claimant incurred for back treatment after February 13, 1995?
4. Is respondent obligated to provide any future medical treatment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The claimant, Joseph G. Hunn, worked for respondent as a service technician from June 1972 through February 15, 1995, approximately 23 years. Claimant initially repaired heating and cooling units and large appliances but later worked on smaller appliances and electronics due to injuries he sustained at work.

From claimant's testimony and the numerous medical records entered into the record, we are able to piece together the following history. In 1985 claimant injured his low back at work and consequently, in January 1988, underwent a discectomy at L4-5. Upon returning to work for respondent claimant did very well until May 1990, when he injured his back moving an appliance. After receiving epidural injections, physical therapy, and conditioning, claimant returned to work for respondent in a management position and then became manager of one of respondent's Doctronecs repair shops, where he also repaired electronic equipment and small appliances. Claimant again injured his back at work in August 1993 lifting a microwave.

All three of those injuries were addressed as Missouri workers compensation matters. Whether claimant received permanent work restrictions due to those injuries is not entirely clear.

Following the 1988 back surgery, claimant was initially released by his surgeon, Dr. Andrew Kaufman, to return to work in June 1988 with restrictions against lifting more than 40 pounds. But in August 1988 the doctor released claimant to return to work with no restrictions. The medical records, however, raise the question of whether such release was required before claimant would be permitted to return to work. Dr. Kaufman saw

claimant again following the 1990 back injury. In September 1990, Dr. Kaufman released claimant to return to work as a service technician repairing small appliances. Also in September 1990, Dr. David A. Tillema, who treated claimant, released claimant to return to work as a service technician. At the time, Dr. Tillema knew claimant managed an electronics store. Dr. Tillema's November 1990 medical notes indicate that claimant should not do heavy lifting, bending, or stooping.

Dr. Roger W. Hood treated claimant for the 1993 back injury he sustained from lifting a microwave. Claimant told Dr. Hood that before the 1993 injury he had a 30 pound lifting restriction. Dr. Hood released claimant in October 1993 to return to normal work with no restrictions. Claimant, however, believed that following the 1993 injury he was restricted from lifting more than 30 pounds and also restricted in regards to bending, twisting, stooping, crawling, overhead reaching, and placing his back in awkward positions.⁵

Nevertheless, claimant returned to managing the Doctrionics store. When respondent closed that business in either 1993 or 1994, claimant transferred to respondent's Lenexa, Kansas, warehouse location where he serviced televisions. That job was much more physical as the heavier TVs weighed from 70 to 350 pounds.

Claimant alleges that on Monday, February 13, 1995, he was lifting a TV when he felt a sharp pain going down his right leg and then a burning sensation in his lower back. That afternoon claimant told the parts manager, Nadine Sindridge (ph), about hurting his back earlier in the day and that his back was very painful.⁶ Ms. Sindridge did not testify.

Claimant completed the workday and also worked the next two days, February 14 and 15. On Wednesday, February 15, claimant advised his manager, Mike Stuckey, about hurting his back and further stated that he might not come into work the next day because he felt he needed to rest his back. There is no dispute that claimant provided respondent with timely notice of the alleged February 1995 back injury.

Claimant did not work on work on Thursday and Friday (February 16 and 17) but, instead, went fishing with a friend. When claimant returned to work on Monday, February 20, he was terminated for poor attendance and for failing to provide a doctor's slip to justify his absence from work. Claimant, an avid fisherman, denies respondent's allegations of plotting to avoid work on Thursday and Friday in order to go fishing. Claimant testified, in part:

I came home and laid down [on February 15] and took some pain pills, and Benny, my friend, had called to see if we were gonna go [fishing] that weekend. I told him I was gonna take off the next two days and I was flat on my back right now.

⁵ R.H.Trans. at 61-62.

⁶ P.H. Trans. at 11-12.

So he told me he'd call me the next morning and see how I was doing. So he called me the next morning, and I took some pain pills and felt pretty good, and he wanted to go out to Clinton Lake and get on the dock and catch some crappie. And I love fishing, and that didn't involve any heavy lifting, and that helps me out as far as being in pain. I can lay at home and be in pain or fish off the dock and be in pain, so yes, I did.⁷

Claimant had vacation time and associate recognition days available that he could have used, if necessary.

Before the alleged February 1995 incident, claimant experienced back symptoms that would wax and wane. Claimant testified he had shooting pains and numbness in his legs following his 1993 low back injury. Accordingly, claimant did not immediately seek medical treatment following the February 1995 incident as he believed his symptoms were merely a flare-up related to his earlier back problems.⁸ But unlike in the past, his symptoms did not improve as claimant expected.⁹

Claimant initially looked for other employment and drew unemployment benefits for a short period of time. Unable to find another job, in July 1995 claimant started a small appliance repair and service business out of his home. Tax records claimant presented at the regular hearing indicated that business venture ended sometime in 1999 after yielding the following yearly net income amounts:

1995	\$ 649
1996	\$1,908
1997	\$1,215
1998	\$1,693
1999	\$ 81

In January 2009, claimant testified he did not believe he could work as he routinely experienced flare-ups of back pain and had difficulty sitting more than 15 to 20 minutes, lifting, and bending. Claimant also testified that he continued to have flare-ups of back pain three or four times a year that lasted anywhere from one to three weeks. At that point in time, claimant had been drawing Social Security disability benefits since either 1998 or

⁷ *Ibid.* at 21.

⁸ *Ibid.* at 34.

⁹ *Ibid.* at 22.

1999.¹⁰ When vocational rehabilitation counselor Michael Dreiling interviewed claimant in November 2000, Mr. Dreiling noted that claimant spent the majority of his days lying down.

Claimant's medical treatment.

Following the February 1995 lifting incident, claimant did not see a doctor until August 1995. Claimant, however, did obtain pain medication in May 1995 from his personal physician. When claimant tried to obtain pain medication from his personal physician in August 1995, he was required to see the doctor. Accordingly, claimant met with Dr. Harold West on August 8, 1995. Claimant informed the doctor that he had experienced increased back pain over the last six months. The doctor told claimant he had failed back syndrome and that he should see a back specialist.

Several days later, on August 10, 1995, claimant saw orthopedic surgeon Dr. Glenn Amundson at the University of Kansas Medical Center. After an MRI and CAT scan, the doctor concluded claimant had a free-floating disk fragment in the low back and needed surgery. The doctor's records indicate that claimant provided him a history of a February 1995 injury. Claimant also informed Dr. Amundson about his long history of back pain and problems and how his symptoms would improve. But this time, however, claimant reported his symptoms were markedly changed as he had increased back pain and a new pain pattern in the legs.

When surgery was not authorized by respondent, claimant obtained a December 1995 preliminary hearing before ALJ Alvin E. Witwer. Judge Witwer authorized Dr. Amundson to treat claimant. But in February 1996 when claimant returned to the doctor and underwent another MRI, the disk fragment could not be seen. Dr. Amundson determined there was no surgical lesion and recommended physical therapy and epidural steroids, which claimant undertook.

Claimant's back improved with treatment. Nevertheless, he occasionally experienced flare-ups of back pain. And on one occasion, respondent referred claimant to Dr. Jeffrey T. MacMillan, an orthopedic surgeon, who examined claimant the first of two occasions in August 1996. The doctor wrote that claimant hurt his back on February 13, 1995, lifting a television. X-rays, CT scan, and a MRI revealed some disc space narrowing at L4-5 and L5-S1; some degenerative spurring at L3, L4, and L5; a small epidural mass at L4-5, and a small disc bulge or herniated disc at L5-S1. All-in-all, Dr. MacMillan felt claimant's examination was essentially normal and that claimant was not a surgical candidate. Dr. MacMillan rated claimant and suggested work restrictions; namely, that claimant avoid repetitive bending, stooping, lifting, carrying more than 30 pounds, and lifting more than 50 pounds.

¹⁰ R.H.Trans. at 40.

In July 1997 claimant returned to Dr. Amundson with back and right leg pain. The doctor believed claimant had residual right L5 radiculopathy and noted claimant was taking about 30 Darvocet every three months. They discussed fusions with cages and the doctor noted that claimant preferred to live with his pain.

Claimant returned to Dr. MacMillan in October 1998 with progressively worsening low back pain and occasional radiating pain into the lower extremities (the right worse than the left). Claimant's activity level was significantly diminished and he had difficulty doing routine household chores. Significant lifting or carrying put claimant in bed for two or three days. An October 1998 MRI showed degenerative disc disease at virtually all of claimant's lumbar levels, Schmorl's nodes throughout the lumbar spine, disc bulging at all levels, and inflammatory changes from the L4 through S1 vertebrae. The doctor noted claimant's degenerative disc disease was worst at L4-5. This time Dr. MacMillan found claimant was a candidate for an interbody fusion with a titanium cage at both L4-5 and L5-S1. But claimant wanted other opinions before proceeding to surgery. He explained:

Because I had a cousin that had it done and he got infected and now he's in a wheelchair for the rest of his life. It was a new procedure and they were just trying it and I didn't want to take a chance on it.¹¹

Accordingly, claimant told Dr. MacMillan he wanted second opinions from Drs. Amundson and Gregory Walker.

When claimant returned to Dr. MacMillan on January 22, 1999, claimant had consulted Dr. Amundson, who recommended a discogram. Claimant had also consulted both Drs. Walker and Roger Jackson, both of whom had discouraged additional surgery.¹² Dr. MacMillan noted that claimant wanted interbody fusion at both L4-5 and L5-S1.

Claimant returned to Dr. MacMillan in early February 1999. The medical records suggest the interbody fusion surgery had been previously scheduled and cancelled. Moreover, in February 1999 the doctor advised claimant that further medical treatment had been denied as part of his workers compensation claim.

Dr. Gregory Pucci examined claimant in September 2000 at the request of claimant's attorney. Dr. Pucci noted that claimant could work until 1995 despite his 1988 back surgery and multiple re-injuries. Accordingly, the doctor concluded the 1995 injury

¹¹ *Ibid.* at 21-22.

¹² Claimant told Dr. Walker in December 1998 about his 1988 surgery and multiple back injuries and about re-injuring his back in 1995 lifting a television. Claimant saw Dr. Jackson twice in January 1999 and told him about his 1988 surgery and that his back pain had worsened over the last four years. Claimant also advised Dr. Jackson that back pain would make him housebound and that he was considering removal of his left testicle due to the pain radiating into his groin and testicle.

was obviously the direct cause of claimant's inability to work. The doctor noted claimant's symptoms and findings were consistent with failed back syndrome but his symptoms after the 1995 accident were markedly worse. In short, Dr. Pucci believed claimant's ongoing back and leg symptoms were related to the 1995 accident rather than merely the natural progression of the preexisting degenerative disease in his spine.

In July 2001, claimant saw Dr. MacMillan for the last time. Claimant had low back pain that would flare every three or four months and become excruciating. Dr. MacMillan found claimant's examination essentially normal. But x-rays showed disc space narrowing at L3 through L5 and osteophytes at L4 and L5. The doctor noted that claimant was a stay-at-home dad, who was not inclined to have surgery and merely wanted medication.

At the request of claimant's attorney, Dr. Fernando Egea examined claimant in late February 2005, which was the first of two occasions. Dr. Egea opined that claimant sustained additional injury in the February 1995 lifting incident, which, in turn, worsened claimant's degenerative disc disease. By letter dated August 30, 2006, Dr. Egea recommended the following work restrictions: no lifting more than 10 pounds; no repetitive lifting, twisting, bending, or turning; no prolonged walking for more than 15 minutes without a 10 minute rest; no prolonged standing without a 10 minute rest. In addition, the doctor indicated claimant was permanently and totally disabled from working.

In September 2006, claimant underwent back surgery by Dr. Bert Parks. Dr. Parks removed a small disc fragment at L4-5. Dr. Parks did not testify. Dr. MacMillan, however, reviewed the operative report and testified that it was a bit difficult to discern what Dr. Parks' surgery entailed.¹³ Nonetheless, Dr. MacMillan testified that the 2006 surgery was not related to claimant's 1995 injury.

A spinal fluid leak developed after the September 2006 surgery and claimant underwent more surgery and procedures to correct that problem.

In late January 2009, claimant saw Dr. Egea for the second and final time. The doctor's medical notes from January 2009 indicated claimant had constant pain in his low back, radiating pain into both legs, and distal paresthesias in his legs and feet. In addition, the doctor related claimant's 2006 surgeries, which the doctor believed were medically necessary, to the February 1995 injury at work.

Did claimant injure his back lifting a television at work?

The record establishes that claimant's low back condition worsened after the February 1995 accident. The voluminous medical records the parties introduced are replete with notations that claimant's low back symptoms were worse following the

¹³ R.H. Trans. at 22.

February 1995 lifting incident. And, for the most part, the history in those records either directly link claimant's increased symptoms to the 1995 incident at work or, at the very least, to that time frame.

Even Dr. MacMillan's initial letters and report indicated that claimant's 1995 injury had contributed to his degenerative disc disease and, in addition, had caused additional permanent impairment. Dr. MacMillan rated claimant in August 1996 and determined the 1995 injury had created a 3 percent permanent functional impairment. And in November 1998, Dr. MacMillan wrote respondent's insurance representative, Sedgwick James, stating that claimant had sustained multiple back injuries and each such injury contributed to his current problems. The doctor further advised that claimant's 1995 injury was the most recent but the earlier injuries most likely caused the greater degree of overall damage. The doctor felt the greatest factor, however, was claimant's age. Dr. MacMillan wrote Sedgwick James again in January 1999 to advise again that claimant had a 15 percent whole person impairment and that 3 percent was related to the February 1995 accident. The doctor acknowledged, however, there was no way to absolutely determine what portion of claimant's complaints were directly related to the 1995 accident but 3 percent was a reasonable number.

Claimant's medical expert, Dr. Egea, also concluded that claimant sustained additional injury from the 1995 lifting incident. In addition, claimant's testimony about the lifting incident and the resulting and ongoing symptoms is credible.

When considering the entire record, the Board concludes claimant injured his back lifting a television at work on February 13, 1995.¹⁴ After that incident claimant's back symptoms did not resolve as they had in the past. The Board finds and concludes that the incident injured and permanently aggravated claimant's low back. Moreover, the Board concludes the accident arose out of and in the course of claimant's employment with respondent.

Did claimant establish his functional impairment?

Following their first visit in August 1996, Dr. MacMillan rated claimant as having a 15 percent whole person functional impairment. In his initial medical notes and initial letter (dated August 1, 1996) to Sedgwick James, the doctor recorded that claimant had a 3 percent whole person impairment from the 1995 injury and a 12 percent whole person impairment from preexisting degenerative disc disease and the injury claimant sustained in the 1980s.¹⁵ Dr. MacMillan's medical notes and reports do not disclose what edition of

¹⁴ The Board watched the video taken by the investigator hired by respondent. That video, however, did not persuade the Board that claimant is dishonest or has been exaggerating his injury.

¹⁵ MacMillan Depo. at 9.

the AMA *Guides* the doctor used to determine claimant's impairment rating. But the doctor later testified he used the third edition.¹⁶

On January 22, 1999, Dr. MacMillan wrote Sedgwick James and advised a second time that claimant had a 15 percent whole person impairment and that 3 percent was related to the February 1995 accident. The doctor further indicated there was no way to absolutely determine what portion of claimant's complaints were directly related to that accident but 3 percent was a reasonable number.

But at his deposition Dr. MacMillan somewhat modified his opinion and testified that the 3 percent whole person impairment rating was for anything that happened between 1988 and 1996. In addition, Dr. MacMillan testified that his 15 percent whole person impairment rating presumed claimant had a 12 percent whole person impairment following the 1988 low back surgery, which he acknowledged he did not know. The doctor testified, in part:

Q. (Mr. Whipple) I understand what you're saying, but I have to point out that your – your written reports do not – do not say what you're stating right now.

And if you look at your August 1st, 1996, report, page 3, you indicate of his current impairment, 3 percent is apportionable to his February, 1995, injury. So in August 1 of 1996, you specifically indicated that 3 percent was due to the February, '95, injury.

A. (Dr. MacMillan) That's based on the premise that he would have had a 12 percent impairment following the '88 surgery, but if that premise is incorrect, then the apportionment is incorrect. So you have to know what his rating would have been in '88.

Q. And do you know that?

A. No.¹⁷

Based upon his later examinations of claimant, Dr. MacMillan did not believe claimant's functional impairment rating had changed.

Although Dr. MacMillan testified that all of claimant's symptoms, impairment, and restrictions were most likely related to a natural worsening and progression of his

¹⁶ *Ibid.* at 62.

¹⁷ *Ibid.* 52-53.

degenerative disc disease, the doctor believed claimant's symptoms and complaints were credible.¹⁸

In February 2005, Dr. Egea rated claimant. The doctor, who is board- certified in neurology and disability evaluations, diagnosed claimant with traumatic myofasciitis with myofascial pain and radiculopathy with loss of motion segment integrity of the spine. Moreover, Dr. Egea opined that claimant further damaged his low back, irritated the nerve roots, and developed chronic back pain as a result of the February 1995 accident. Dr. Egea rated claimant with a 25 percent whole person functional impairment under the fourth edition of the *AMA Guides*.

The Act requires that functional impairment be measured under the *AMA Guides*. And the law in effect on claimant's date of accident specified that the revised third edition of that publication was to be used.¹⁹ As indicated above, neither Dr. Egea's rating nor Dr. MacMillan's rating was pursuant to the required version of the *AMA Guides*. Therefore, the Board finds that claimant has failed to carry his burden of proof.

The Board notes claimant argued Dr. Egea's functional impairment opinion should be adopted as that rating was pursuant to the Fourth Edition of the *AMA Guides* and the *Bodine*²⁰ decision allegedly held that charts in the revised third edition and the fourth edition of the *AMA Guides* were identical. The Board disagrees. *Bodine* is distinguishable. In *Bodine* there was specific testimony that the injured worker's functional impairment rating would have been the same under either the revised third edition or the Fourth Edition of the *AMA Guides*. But in the present claim there was no such testimony.

CONCLUSIONS OF LAW

Is claimant entitled to either permanent partial disability or permanent total disability benefits?

As indicated above, claimant injured his low back and aggravated his preexisting degenerative disc disease on February 13, 1995, while lifting a television. Other than performing some work out of his home from 1995 into 1999, claimant has not worked since his accident. Claimant has drawn Social Security disability benefits since either 1998 or 1999.

¹⁸ *Ibid.* at 35.

¹⁹ See K.S.A. 44-510e (Furse).

²⁰ *Bodine v. Great Bend Packing Co., Inc.*, No. 193,789, 1999 WL 1008008 (Kan. WCAB Oct. 29, 1999).

K.S.A. 44-510c(a)(2) (Furse 1993) provides:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms “substantial and gainful employment” are not defined in the Act. However, the Kansas Court of Appeals in *Wardlow*²¹, held: “The trial court’s finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent.”

Claimant’s testimony that his back pain is excruciating when he experiences flare-ups is credible. Respondent’s medical expert, Dr. MacMillan, did not question claimant’s alleged symptoms. Dr. Egea concluded claimant was incapable of engaging in any type of substantial and gainful employment. And claimant’s vocational expert, Mr. Dreiling, concluded claimant was essentially and realistically unemployable in the open labor market. The Board agrees. The Board concludes it is more probably true than not that claimant is unable to perform substantial and gainful employment in the open labor market and, therefore, he is entitled to receive permanent total disability benefits.

The Board is mindful that claimant attempted self-employment from 1995 through sometime in 1999. Nonetheless, his net earnings indicated that self-employment was neither substantial nor gainful.

Is claimant entitled to receive payment of additional authorized, unauthorized or future medical expenses?

The ALJ denied claimant’s request that respondent be ordered to pay the expenses related to his 2006 low back surgery and its resulting complications. The Board finds that respondent’s liability for those expenses is limited. The record fails to establish that claimant requested respondent to provide him medical treatment at that juncture or even notified respondent or its insurance carrier that he was contemplating the surgery by Dr. Parks. In this instance, the Board finds that respondent’s liability is limited to that provided by the unauthorized medical statute, K.S.A. 44-510(c)(2) (Furse 1993), which provides:

Without application or approval, an employee may consult a health care provider of the employee’s choice for the purpose of examination, diagnosis, or treatment, but

²¹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtain in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The Board concludes that respondent's liability for the expenses related to claimant's 2006 back surgery is limited to \$500. And that assumes respondent has not previously paid other unauthorized medical expense for which respondent would be entitled to receive credit and further reduce its liability for unauthorized medical benefits.

The Act provides that an injured worker may apply for additional medical treatment after the entry of an Award. Disputed issues shall be decided by an ALJ. K.S.A. 44-510k(a) provides:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

The statute entitles claimant to seek additional or future medical treatment. Accordingly, respondent's request to deny claimant any and all future medical treatment is denied.

Is the claim barred by K.S.A. 44-523(f)?

Finally, the majority is compelled to address whether this claim should be dismissed for failing to prosecute this claim in a timely manner. The Kansas legislature in 2006 enacted K.S.A. 44-523(f), which states that a claim shall be dismissed for lack of prosecution unless it has gone to regular hearing, settlement hearing, or an agreed award within five years from the date of filing the application for hearing. The statute, which became effective July 1, 2006, reads:

Any claim that has not proceeded to regular hearing, a settlement hearing, or an agreed award within five years from the date of filing the application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the

administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.²²

Claimant filed an application for hearing with the Division of Workers Compensation on September 28, 1995. Applying the statute to this claim would produce an unconscionable and unreasonable result as the five year period to prosecute this claim would have expired in September 2000, or almost six years before the statute was enacted.

This was not an issue the parties raised to the ALJ. Accordingly, the parties have neither briefed that issue or otherwise addressed it. Moreover, it is unknown whether any party believes the statute is applicable. Nonetheless, the dissent has raised the issue and the majority should address it.

The majority concludes there are several reasons why K.S.A. 44-523(f) should not apply to this claim. First, the Board's jurisdiction is limited to those issues raised to the ALJ. K.S.A. 44-555c(a) provides in pertinent part:

The board shall have exclusive jurisdiction to review all decisions findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.** (Emphasis added.)

As the parties did not raise this issue to the ALJ, the Board should not address it for the first time on appeal. Similarly, as the issue was not raised to the ALJ when the parties designated the issues to be decided, respondent has waived or abandoned any defense that K.S.A. 44-523(f) might otherwise provide.

Third, the Board has previously ruled that K.S.A. 44-523(f) should operate prospectively and, therefore, only apply to those accidents that occurred on or after the statute's July 1, 2006, effective date. A general rule of statutory construction provides that a statute should operate prospectively unless its language clearly indicates that it should be applied retroactively. This is especially true whenever the statute or amendment creates a new liability or the statute or amendment changes the substantive rights of the parties.²³ The amendment in question does not express a clear intent that should operate

²² K.S.A. 44-523(f).

²³ *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

retroactively and it clearly affects the substantive rights of injured workers as it affects the amount of benefits that an injured worker can receive. And it is settled law that the rights between the parties are determined by the law in effect on the date of injury. Hence, the statute should not apply to claimant's February 13, 1995 accident.

Finally, the majority is concerned about the constitutionality of the statute. The statute lacks basic due process. There is no requirement that any notice be given nor is there any opportunity to be heard. The statute only appears to permit employers and their insurance carriers to close their files on a claim without first having a full and fair hearing. The statute does not address whether a dismissal is final or whether a new application could be later filed to revive the claim. In the event the statute intends to create some sort of a summary dismissal docket, the Division of Workers Compensation should promulgate rules and regulations that incorporate, at the least, the minimal requisites of due process.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 26, 2009, is modified to grant claimant permanent total disability benefits.

Claimant is entitled to permanent total disability compensation at the rate of \$319 per week not to exceed \$125,000 for a permanent total general body disability, which is owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members respectfully dissent from the result reached by the majority.

In *Owen Lumber Co.*²⁴, the Kansas Supreme Court stated:

[W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:

‘[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute’s effect on previously acquired rights. The Court has recognized that the removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.’

Under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, it is not a procedural amendment only. But in those cases where the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute the claim, the statute’s effect may not be procedural as to that claim and the amendment could be applied retroactively.

The new subsection would affect a claimant’s substantive rights if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus “blindsiding” the claimant with a dismissal. Conversely, if the five-year period had not expired by the time the statute took effect the claimant may have time to proceed to final hearing or show good cause for an extension of time. Under such circumstances the claimant should have a reasonable opportunity to comply with the new subsection’s procedural requirement before it is given retroactive application. The test is

²⁴ *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

what constitutes a reasonable time from the effective date of the amendment until the five-year period expires. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should also alert counsel to the need to prosecute a claim and be factored in to the determination of what constitutes a reasonable time. In this case the regular hearing was not held until January 22, 2009, which was over 30 months after the effective date of K.S.A. 44-523(f). Claimant made no request for an extension of time before the regular hearing was held.

The date upon which K.S.A. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute should not operate retroactively if it is applied to an application's "fifth anniversary" date that fell before the statute became effective. But in those cases where the application's fifth anniversary falls after the effective date of the statute, the statute may be applied with retroactive effect where it is reasonable to do so. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period."

The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

K.S.A. 2006 Supp. 44-523(f) is to be applied retroactively to accidents occurring before July 1, 2006, the effective date of the statute, only when it is reasonable to do so. Under the facts of this case, the time limit ran before the subsection became effective. Nevertheless given the length of time that elapsed between the effective date of the statute and the regular hearing of January 22, 2009, it is reasonable to apply K.S.A. 2006 Supp. 44-523(f) to this claim. Accordingly, the undersigned Board Members, would dismiss this claim for lack of prosecution pursuant to K.S.A. 2006 Supp. 44-523(f).

We share the majority's concern about the lack of notice and due process protections in the statute. However, that is an issue for another court to address. We are also concerned by the procedure followed by the Director of the Division of Workers Compensation and the Administrative Law Judges which seem to be in conflict with the provisions of K.S.A. 44-523(f). The form KWC-E1 promulgated by the Division is entitled "Application for Hearing". As noted by the majority, claimant filed his application for

hearing on September 28, 1995. Nevertheless, a regular hearing was not held until January 22, 2009, over 13 years later. Does K.S.A. 44-523(f) contemplate that the Division or Administrative Law Judge will give claimant a hearing date within a reasonable time of the filing of the application for hearing? Or does K.S.A. 44-523(f) contemplate that a claimant must take additional affirmative steps to ensure that the hearing will be scheduled and actually held within five years after the application for hearing is filed?

BOARD MEMBER

BOARD MEMBER

c: David W. Whipple, Attorney for Claimant
Thomas Clinkenbeard, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge